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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FREDDIE GOLD and Wife, GOLDIE GOLD,
Petitioners,

v.

NATIONAL SAVINGS BANK OF THE CITY OF ALBANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals For The Sixth Circuit

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INTRODUCTION AND JURISDICTIONAL STATEMENT

Respondent National Savings Bank of the City of Albany ("Bank") prays that the Petition For Writ of Certiorari of Freddie Gold and wife Goldie Gold ("Gold") be denied for the reason that the judgment of the United States Court of Appeals for the Sixth Circuit, entered on February 13, 1981, is correct. The written opinion of the appellate court is contained in the Appendix to Gold's Petition and, therefore, is not appended hereto.

Bank agrees with the jurisdictional statement contained in Gold's Petition.

STATEMENT OF THE PROCEEDINGS BELOW

This diversity case arises out of an alleged breach of a written commitment to provide a permenant loan by the Bank to Gold. By special interrogatory, the jury found that the Bank acted fraudulently in refusing to make a permanent loan to Gold. Gold was awarded $150,000.00 compensatory and $50,000.00 punitive damages by the jury. Bank moved for a judgment n.o.v. with respect to the compensatory and punitive damage verdicts. The trial court granted the Bank a judgment n.o.v. as to punitive damages and denied Bank a judgment n.o.v. as to the compensatory verdict but ordered a remittitur of $50,000.00 of the compensatory award. Bank appealed the jury's determination on the special Interrogatory and an award of damages in any amount. Gold did not appeal the remittitur of $50,000.00 but filed a cross-appeal as to the trial court's decision to grant a judgment n.o.v. with respect to the punitive damage award.

The appellate court affirmed the District Court's judgment n.o.v. in favor of the Bank with respect to punitive damages and reversed the District Court's decision which denied the granting of the judgment n.o.v. with respect to compensatory damages.

The question presented to the appellate court was whether there was sufficient evidence in the record to support the jury's finding that the bank's architect, Ronald R. Rucinski, acted in bad faith in determining that the apartment complex in question was not constructed in accordance with the plans and specifications and in a good and workmanlike manner.

STATEMENT OF FACTS

In their Complaint, Gold alleged a breach of a written commitment to provide a permanent loan by the Bank to apartment

owners and developers, Gold.[1] The purpose of the commitment was to provide permanent financing for a 32 apartment complex known as Overton Square Apartments in Memphis, Tennessee. The principal amount of the loan was $300,000.00 at the rate of 9¼% per annum for twenty-seven years.[2]

After the apartment complex was built, the Bank declined to fund the loan as it was permitted to do under the permanent loan commitment on the basis of the inspection and written report of an independent architect, Ronald R. Rucinski, who advised the Bank that serious deficiencies existed on the complex.

Gold claims the bank declined to fund the permanent loan because the Bank wanted to take advantage of the newly passed federal legislation which would allow the Bank to increase the rate of interest on said permanent loan in excess of the 10% rate of interest in Tennessee.

The Bank admitted that it declined to fund the permanent loan but denied that the declination was involved in any way with the new federal legislation affecting interest rates. To the contrary, the Bank declined the permanent loan because Gold failed to comply with a provision in the permanent loan commitment to which Gold had agreed, that is, to furnish an architect's certificate that the apartment complex had been constructed in a good and workmanlike manner and according to the final plans and specifications submitted to the Bank. Gold

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[1]Actually there was no direct agreement between the bank and Gold. However, the bank agreed by a commitment letter with Gold's mortgage banker, Percy Galbreath & Son, Inc. ("Galbreath") to make available to Gold a permanent loan for the Overton Square Apartments.

[2]Originally, the rate of interest was 8 3/4% but after a long delay in completion of construction which required four extensions, the parties agreed on 9¼% per annum.

admitted that he never submitted any architect's certificate as required under the first condition of the loan. Secondly, Gold had agreed in the loan commitment to allow an independent architect to inspect the apartment complex and determine if it was constructed in a good and workmanlike manner and in accordance with plans and specifications submitted to the Bank. According to the terms of the loan commitment, this architect's determination would be final and conclusive.

Although Gold agreed to have the apartment complex completed by January 31, 1974, it is undisputed that he did not begin construction until August 21, 1973 and after several extensions requested by Gold, the complex was not completed until after November 29, 1974. Under the terms of the permanent loan agreement, the Bank was entitled to terminate its commitment to provide permanent financing since the complex was not completed by January 31, 1974, but instead the Bank extended its commitment on five separate occasions. In return, the Bank increased the rate of interest charged for the permanent financing from the original 8 3/4% to 9¼%. During the same period of time, construction financing which was provided by Galbreath, was increased from 9 3/4% to 10%.

Upon notification that the apartment complex was completed, the Bank sent one of its loan officers and one of its trustees to inspect the improvements. This inspection revealed to the Bank representatives apparent evidence of poor workmanship and substantial deviations from the plans and specifications submitted to the Bank. Thereafter, within a few days of the Bank official's inspection, representatives of Galbreath visited the Bank in Albany, New York, on behalf of Gold, and claimed that the deficiencies had been corrected and that the apartment building deserved another inspection. The parties agreed that pursuant to paragraph 4 of the permanent loan commitment, the Bank would send an architect to inspect the premises to determine if the improvements were constructed in a good and workmanlike manner and in accordance with the

plans and specifications submitted to the Bank. Architect Rucinski was chosen by the Bank to inspect the premises. He had no relationship to the Bank either as a depositor or by prior employment. He did live and practice his profession in Albany, New York. After Rucinski inspected the improvements for workmanship and conformance to the plans and specifications as submitted to the Bank, he sent the Bank a written report of forty-seven items on which he based his findings that the apartment complex contained serious deficiencies.

After receiving Rucinski's report, the Bank advised Gold through his representative, Galbreath, that it would not fund the permanent loan because the construction had not been done in accordance with the plans and specifications and in a good and workmanlike manner.

Approximately two months after the Bank refused to fund the permanent loan, Frank Lansky, Gold's architect, who drew the plans and specifications for said complex, made an inspection on behalf of Gold. He prepared two reports, the first revealing 29 deficiencies in the workmanship and variations from the plans of specifications which were among the 47 deficiencies found by Rucinski.

In October, 1974, the U.S. House of Representatives and the U.S. Senate passed and the President signed a Bill entitled Debt Obligation and Usury Ceiling which is commonly known as the "Brock Bill" because it was introduced by Senator Brock from Tennessee. The Brock Bill allowed states, such as Tennessee which had a constitutional limit of interest of 10%, to charge interest not to exceed 13½% per annum. The National Savings Bank of the City of Albany, although it contains the word "National" in its name, is not a national bank under the United States Statutes but rather is a State Savings Bank chartered in the State of New York. At or about the time that the Brock Bill was passed and signed into law, the Bank was advised by its attorneys in Albany that such Bill did not apply to their Bank.

Later, during the pendency of the instant lawsuit, the Bank's attorneys advised that the Brock Bill was applicable to said Bank and that it could charge rates not in excess of 13½% per annum if it so desired. No officials of Galbreath ever had any discussions with the Bank regarding the Brock Bill or its applicability to Gold's loan. Furthermore, Mr. Gold never conversed with any officials of the Bank with respect to any aspects of the apartment complex. All of his dealings were with Galbreath and its officers. Likewise, Gold had no conversations with anyone from Galbreath regarding the Brock Bill. Indeed, Gold was not even aware of the provisions of the Brock Bill. Passage of the Brock Bill was not in any way involved with the Bank's decision to decline to fund the permanent loan for Gold's apartment complex. The Bank closed other permanent loans in Memphis and Knoxville, Tennessee, after the time that Gold's loan was to be closed and all of these loans were at rates of interest which were lower than the rate of interest agreed to between the Bank and Gold. On January 15, 1975, the Bank closed a permanent loan apartment project on Carnes Avenue, Memphis, Tennessee in the sum of $290,000.00 at a rate of interest of nine percent (9%) and, also, during this same month, the Bank closed a permanent loan in Knoxville, Tennessee for the sum of $600,000.00 at a rate of interest of nine percent (9%). Neither before nor after the termination of the permanent loan commitment did the Bank ever suggest to Gold or Galbreath that it would agree to furnish permanent financing at a rate of interest higher than 9¼%.

QUESTION PRESENTED FOR PURPOSES OF GRANTING OR DENYING GOLD'S PETITION FOR WRIT OF CERTIORARI

Under the facts of this diversity case, was the federal court bound by state law or federal law in determining whether there was sufficient evidence to support the jury's verdict and whether there was sufficient evidence to withstand a motion for judgment n.o.v.

Answer of Respondent Bank:

> There is no reason for this question to be considered by this Court because, under the facts of this case, applying either the state or federal standard, would result in a judgment n.o.v. for Respondent Bank.

ARGUMENT

Gold asserts that the Petition should be granted to allow this Court to review the standard, state or federal, to be used in determining the sufficiency of evidence to go to the jury where jurisdiction is based upon diversity.

Gold further asserts that the appellate court in the instant case applied the well settled rule in the Sixth Circuit that in diversity cases, federal courts are bound by state law in determining whether there is sufficient evidence to support a jury verdict.

In Tennessee, the rule of law with respect to the scope of Appellate review, is that all evidence for the plaintiff must be taken as true, allowing all reasonable inferences therefrom and disregarding all contravailing evidence; however, there must be substantial and material evidence from which the jury could have based a verdict for the plaintiff. *Phelps* v. *Magnavox Co.*, 497 S.W.2d 898 (Tenn. App. 1972); See also *Camurati* v. *Sutton*, 48 Tenn. App. 54, 342 S.W.2d 732 (1962), and *Cude* v. *Culverson*, 30 Tenn. App. 628, 209 S.W.2d 506 (1947).

Although it based its decision in the instant case on state law, the appellate court recognized there is currently a split in the circuits as to whether the issue of federal or state law controls in diversity cases when determining if sufficient evidence has been presented to withstand a motion for judgment n.o.v. Citing for comparison, *Wratchford* v. *S. J. Groves and Sons Co.*, 405 F.2d 1061 (4th Cir. 1969), and *Kuziw* v. *Lake Engineering Co.*, 586 F.2d (7th Cir. 1978).

In the same footnote of the appellate decision which recognized the split in circuits, the court was quick to add:

> In this case, as the text of the Opinion makes clear, application of either state or the federal rule mandates a judgment for the defendant, since there was no probative

> evidence of fraudulent intent on the part of the defendant or its architect introduced at trial.

In the body of the appellate decision, the Court stated:

> Upon a review of the record in the case, we have found no evidence, much less substantial evidence, to support the jury's affirmative answer to the special interrogatory submitted by the Court.

It should be pointed out that the appellate court appendix prepared by the parties consisted of two printed volumes of testimony and one printed volume of exhibits. After oral argument, the appellate court requested that the entire transcript of the trial, some 1,500 pages of testimony, be sent to the court for its review. Nowhere in those 1,500 pages of testimony was there any evidence to support the jury's verdict.

The entire record indicates that Gold introduced no direct evidence of any fraudulent conduct on the part of architect Rucinski. In addition, there was no evidence that the Bank officials or Rucinski ever discussed the Brock Bill with respect to Gold's apartment complex and, finally, there was no evidence to show any fraudulent intent on the part of the architect to prepare an inaccurate report as to the quality of workmanship of the apartment project. With respect to the Brock Bill, the only evidence in the record indicates that the Brock Bill was enacted by Congress about the same time as the Bank refused to fund its permanent loan. Bank contends that the appellate court correctly found that such a fact, standing by itself, is "insufficient to support an inference that the Bank's architect inspected the apartment project with bad faith."

CONCLUSION

Respondent Bank contends that, in its Opinion, the appellate court disposes of Gold's reason for requesting this Court to grant a Petition For Writ Of Certiorari. Under the facts of this case, applying either the state or federal standard would result in a judgment n.o.v. for Bank. Accordingly, Respondent National Savings Bank of the City of Albany respectfully requests that Gold's Petition be denied.

Respectfully submitted,

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